IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**SUPPLEMENT TO**
	)	**DEFENSE MOTION TO**
	)	**COMPEL DISCOVERY #2**
v.	)	
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	30 May 2012
Fort Myer, VA 22211	)	

ADDITIONAL FACTS

1. On 30 May 2012, the Government requested a telephonic 802 conference in order to, *inter alia*, clarify the scope of the Court's 29 May Ruling ordering the Government to produce a witness from the State Department to testify at the 6-8 June 2012 motions argument.

2. During the call, the Government requested clarification as to what the Defense would be asking the State Department witness, so as to ensure that the right witness was provided and so that, if necessary, protective measures could be put in place to safeguard classified information. The Defense stated that it would ask the Department of State witness questions about whether documents exist within the Department of State with respect to the following:

> (a) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the overall effect that the WikiLeaks release could have on relations within their host country, if any;
>
> (b) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;
>
> (c) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND
>
> (d) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

See Defense Motion to Compel Discovery #2 at p. 8, 11-12. For instance, it would ask the Department of State witness whether the WikiLeaks Working Group was actually created; if so, whether they had any documentation and in what form; and whether any of this material is already contained within the damage assessment provided by the Department of State.

3. The Government expressed confusion about producing the witness. MAJ Fein stated that it seemed like the Defense was asking for what material might be found within the Department of State. If so, the proper way to do this is not through a witness, but through a proper discovery request. The Defense was absolutely baffled by MAJ Fein's statement.[1] The Defense has made previous discovery requests for this information, but the Government has prevaricated on whether it even existed. More importantly, the request for this information was most recently made in the Defense Motion to Compel Discovery #2. To now suggest that the Defense has not *asked for* this information is preposterous.

4. When the Defense and the Court pointed out that the Defense had repeatedly asked for this information, the Government switched its tune, almost pretending that it had not made the crazy statement to the effect that if the Defense wanted this information, it should have asked for it.

5. The Government's new argument was that it does not dispute that the things referenced above actually happened (i.e. the Government would stipulate that a Working Group, Mitigation Team, etc. were constituted), but instead disputes whether the Defense is entitled to these documents. That is, the Government conceded that documents from (1)-(4) exist, but maintained that the Defense had not stated an adequate basis for discovery and thus was engaging in a "fishing expedition." Thus, it was not entitled to these documents under R.C.M. 701(a)(6) or 701(a)(2).

6. The Defense asked whether the Government had seen the requested documents. The Government admitted that it was still working to get these documents and had not reviewed them. Its first priority was getting the damage assessment from the Department of State; these other documents had lower priority. The Defense expressed its disbelief that discovery requests were made for these documents in 2011, and the Government had not obtained (much less reviewed) the documents when the trial is scheduled for a mere few months from now. The Defense also asked the Government how it could claim that these documents were not discoverable when it had not yet reviewed them. The Government did not provide a response.

7. The Court ultimately ordered the Government to produce a witness from the Department of State and directed that the Defense's questioning be limited to what documents, if any, existed within the Department of State.[2] The Court also ordered the Government to put together a list of all the evidence (both documentary and testimonial) that it intended to introduce in aggravation. Because some of the evidence might be classified, the Court permitted the Government to propose a workable format for this list.

[1] The Court also indicated repeatedly that it was confused by MAJ Fein's statement.

[2] In light of the new information learned by the Defense, the Defense indicated that it would also like to question the witness about *when* the Government asked for (1)-(4) from the Department of State. The Court was of the view that this was a question for the Government and not for the Department of State.

ARGUMENT

8. In its Motion to Compel Discovery #2, the Defense asked for the Court to order the Government to prepare a "due diligence" statement explaining the steps it has taken in its *Brady* search. In that motion, the Defense explained the reasons why it was imperative that the Government be held to account for its *Brady* search. In particular, the Defense referenced a 17 April 2012 memo from HQDA which revealed that the Government had not yet conducted a *Brady* search of *its own files*. The memo showed that the Government sent an original request out in July 2011, but that the Government did not realize that the request had not been acted upon until nearly nine months later. This utter lack of diligence in searching its own files does not inspire confidence that the Government is diligently searching files of closely aligned agencies.

9. The Defense has now learned of new information that supports the Defense's argument that the Court should order the Government to prepare a "due diligence" statement. The Government has not conducted a search of files within the Department of State, an agency that is "closely aligned" with the Government within the meaning of *Williams. United States v. Williams,* 50 M.J. 436 (C.A.A.F. 1999). Under *Williams,* a prosecutor must search:

> (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. [citations omitted].

The Defense submits that the Government has a *Brady* obligation to search files from the State Department both under the second and the third prong of *Williams*.

10. The Government appears to be saying that it needs some authority or proffer or relevance, above and beyond *Brady/Williams*, in order to conduct this search. This position is troubling. The Defense made a "discovery request[] that involved a specified type of information within a specified entity" for items (1)-(4), referenced above. At this point, the Government's *Brady/Williams* obligations kick in and the Defense does not need to proffer any further basis for the Government. The relevance of the documents requested is so self-evident (harm, mitigation, risk to individuals, etc.) that the Government's position that the Defense had not stated an adequate basis for these documents is disheartening.

11. Even if the Defense had not made a specific request (which is clearly did), the Government would still have an obligation to search the Department of State files. The Government recognizes this in its Response Motion where it states, "The prosecution shall, and will, disclose Brady and RCM 701(a)(6) material even in the absence of a defense request." Government Response Motion, p. 16. Despite apparently being aware of the relevant law, the Government still does not understand what it is doing.

12. The Defense had assumed that since the Court set the Government straight in its 23 March 2012 Ruling, the Government was (albeit belatedly) following-through on its *Brady* obligations. The more the Defense learns – either through accident or through conversations involving

tangentially-related matters – the more it is apparent that the Government still does not have a handle on *Brady* and discovery in general.

13. To date, the Defense has received very little *Brady* material. The Government assures the Defense that more is forthcoming. *See* Government Response, p. 16. R.C.M. 701(a)(6) requires the Government to provide *Brady* material "as soon as practicable." Most of the *Brady* material provided thus far (with the exception of the damage assessments) is unclassified. It is unclear why unclassified *Brady* material was not provided earlier, and why the Defense is still waiting for the bulk of *Brady* discovery. The Government has had over two years to perform a *Brady* search. It can hardly be said that providing *Brady* to the Defense two years into the case (and less than three months before trial) qualifies under R.C.M. 701(a)(6) as "as soon as practicable." The Defense believes that the Government is either willfully blind to its discovery obligations or that it is dragging out the process to obtain a tactical advantage. Neither can be tolerated.

14. Further, there are big question marks on whether the Government has searched for *Brady* in all the relevant files. Based on: a) the HQDA Memo; b) the Government's admission about not even starting the Department of State search; and c) *Brady* information being provided to the Defense in dribs and drabs, it is safe to assume that the Government is missing the mark on its *Brady* obligations, despite its protestations to the contrary.

15. At this juncture, there are serious *Brady* questions regarding the following agencies or organizations:

a) Interagency Committee Review – the Government does not appear to have conducted a *Brady* search
b) the President's Intelligence Advisory Board – the Government states that it is in the process of searching for *Brady* (Government Response, p. 4).
c) the House of Representatives Oversight Committee - the Government does not appear to have conducted a *Brady* search
d) the Chiefs of Mission review – the Government has not conducted a *Brady* search
e) the WikiLeaks Working Group - the Government has not conducted a *Brady* search
f) the "Mitigation Team" created by the Department of State - the Government has not conducted a *Brady* search
g) the Department of State's reporting to Congress - the Government has not conducted a *Brady* search
h) DIA – it is unclear whether the Government has conducted a *Brady* search
i) DISA - it is unclear whether the Government has conducted a *Brady* search
j) CENTCOM and SOUTHCOM - it is unclear whether the Government has conducted a *Brady* search
k) April 2012 HQDA Memo – the Government is currently in the process of conducting a *Brady* search
l) FBI – the Government claims to have produced all *Brady* from the grand jury testimony; the Government claims to have produced "at least *Brady*" in the remaining portions of the FBI file it has produced, but it is unclear whether the Government has actually completed its *Brady* search of other FBI files
m) DSS - it is unclear whether the Government has conducted a *Brady* search

n) DOS – the Government does not appear to have conducted a *Brady* search (since its first priority was simply getting the Court the damage assessment).
o) DOJ - it is unclear whether the Government has conducted a *Brady* search
p) Government Agency - it is unclear whether the Government has conducted a *Brady* search
q) ODNI - it is unclear whether the Government has conducted a *Brady* search
r) ONCIX – the Government is currently in the process of conducting a *Brady* search
s) 63 agencies and other organizations the Government has claimed to have contacted – the Government represented that it *already* searched the 63 agencies and that none of these agencies had *Brady* material; apparently, it is now re-searching these files under the correct *Brady* standard.

16. Not only has the Defense not yet received *Brady* material from all of these organizations, but it seems that the Government has not even contacted some of these organizations. *See e.g.* Government Response, p. 3-4 (stating that the prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board; but resisting searching for *Brady* material from the Interagency Committee Review and the House of Representatives Oversight Committee).

17. At a certain point, we can no longer believe the Government when they say they know what they are doing and they are working "diligently." This is simply not the case. The HQDA Memo and the fact that they have not reviewed key Department of State files prove otherwise. As such, the Government should be directed to account for the steps that it has taken in fulfilling its *Brady* obligations, as discussed in the Defense's Motion to Compel Discovery #2.

Respectfully submitted,

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